Supreme Court, U. S.
FILED
MAY 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1564

SOUTHPARK SQUARE, LTD.,
Petitioner,

vs.

CITY OF JACKSON, MISSISSIPPI, and STATE HIGHWAY DEPARTMENT OF THE STATE OF MISSISSIPPI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

ALVIN M. BINDER
BINDER, MOORE & HOWELL
511 East Pearl Street
Post Office Box 25
Jackson, Mississippi 39205
601-948-8800
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Introductory Statement	1
Jurisdictional Statement	2
Questions Presented for Review	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
Argument	8
Conclusion	18
Appendix A—Opinion of the United States Court of Appeals for the Fifth Circuit	A-1
Appendix B—Order Denying Petition for Rehearing En Banc	A-17

Cases Cited

Ballard Fish & Oyster Company, Inc. v. Glaser Construction Company, Inc., 424 F.2d 473 (4th Cir. 1970)	10
Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 539 (1945)	11, 12
Cuyahoga River Power Company v. City of Akron, 240 U.S. 462, 36 S.Ct. 402, 60 L.Ed. 743 (1815)	14
Foster v. City of Detroit, 264 F.Supp. 655, aff. 405 F.2d 138 (6th Cir. 1968) motion denied 423 F.2d 660	14
Foster v. Herley, 330 F.2d 87 (6th Cir. 1964)	10, 16

Gully v. First National Bank in Meridian, 229 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936) 12

Hines v. Cenla Community Action Committee, Inc., 474 F.2d 1052, 1056 (5th Cir. 1973) 13

International Association of Machinists v. Central Airlines, Inc., 295 F.2d 209, 218 (5th Cir. 1961) 13

Jackson Municipal Airport Authority v. Evans, 191 So.2d 126 (Miss. 1966) 9

Jacksonville v. Schumann, 167 So.2d 95 (Fla. App. 1964) 9

Martin v. Port of Seattle, 64 Wash.2d 309, 319 P.2d 540, cert. den. 379 U.S. 989, 85 S.Ct. 701, 131 L.Ed.2d 610 9

McGoon v. Northern Pacific Railway Company, 204 F. 998 (D.C.N.D. 1913) 13

Mosher v. City of Phoenix, 287 U.S. 29, 53 S.Ct. 67, 77 L.Ed. 148 (1932) 14

NLRB v. Shipbuilding Local 22, 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed.2d 706 (1968) 15, 16

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 675, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) 12

Swafford v. Templeton, 185 U.S. 487 (1901) 12

United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359-60, 89 L.Ed. 311 (1945) 7, 9

Statutes

U.S. Constitution, Amendment V 2, 3, 5, 8, 12

U.S. Constitution, Amendment XIV, Section 1 .2, 3, 5, 8, 10, 12

Title 28, United States Code, Section 1331 (Supp. 1977) 2, 3, 5, 7, 11, 14

Other Authorities

27 Am.Jur.2d, Eminent Domain, Section 478, p. 411 ... 9

29 C.J.S., Eminent Domain, Section 6, p. 182 11

30 C.J.S., Eminent Domain, Section 399, pp. 475-77 9

3 Davis, Administrative Law Treatise, Section 20.10 (1958) 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. .....

SOUTHPARK SQUARE, LTD.,
Petitioner,

vs.

CITY OF JACKSON, MISSISSIPPI, and STATE HIGHWAY DEPARTMENT OF THE STATE OF MISSISSIPPI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

INTRODUCTORY STATEMENT

The Petitioner, Southpark Square, Ltd., respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, officially reported as *Southpark Square, Ltd. v. City of Jackson, Mississippi*, 565 F.2d 338 (5th Cir. 1977), handed down by the United States Court of Appeals for the Fifth Circuit on December 27, 1977.

The opinion of the United States Court of Appeals for the Fifth Circuit is appended, bound with this Petition, and marked Appendix "A".

Petition for Rehearing En Banc was denied by the United States Court of Appeals for the Fifth Circuit on February 2, 1978, and the Order denying the Petition for Rehearing En Banc is appended, bound with this Petition, and marked Appendix "B".

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit, and Order of said Court denying the Petition for Rehearing En Banc dated February 2, 1978.

Petitioner believes that this Court has jurisdiction to review said judgment by Writ of Certiorari by virtue of 28 United States Code, Sec. 1254.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a municipality's denial of a building permit ultimately resulting in the property owner's loss of his property for inability to obtain financing, is a compensable taking under the Fifth and Fourteenth Amendments to the United States Constitution.

(2) Whether the Federal District Courts have jurisdiction under 28 United States Code, Sec. 1331, to entertain suits based thereon.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States, and Title 28, Section 1331, of the United States Code.

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28, United States Code, Section 1331, provides:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States."

STATEMENT OF THE CASE

On May 31, 1973, Southpark Square, Ltd., Petitioner (herein "property owner"), obtained an option from Calvin L. Wells, individually, Gus Primos, individually, Hayloft, Inc. (Gus Primos, President) and Ken Primos, individually, for the purchase of approximately seven hundred (700) front feet along Interstate Highway 55 North, located just north of the I-55/Briarwood exchange in Jackson, Mississippi. At the time the option was taken, property owner paid option money to the sellers totaling $10,000.00. On August 10, 1973, property owner notified Calvin L. Wells and the above sellers of its intent to exercise these options. (A.138). On December 3, 1973, title passed from Calvin L. Wells, et al., to property owner to all property covered by the options given in May. At the time title passed, property owner paid an additional $50,000.00 toward the purchase price (A.139), the purchase price being $620.00 per front foot, or a total of $434,000.00 (A.138). It was the intention of property owner to develop the land for constructing and operating a Ramada Inn Motel project (A.139).

On February 4, 1974, property owner submitted its application for a building permit to the City of Jackson (herein "City") for the construction of a Ramada Inn on the property (A.18) (Ex. P-1, 15), (A.139). Mr. Murray Stewart of the City orally notified Mr. Billy Cantrell, an employee of property owner, that the building permit would not be issued because of a proposed interchange at I-55 and Beasley Road (A.42, Ex. P-2 No. 2). On February 21, 1974, after several calls and conferences with Stewart and Cantrell relative to the issuance of the permit, the City, by Murray Stewart, advised that, "the City of Jackson is presently deferring the issuance of a permit for the construction of the proposed Ramada Inn in the Beasley Road area." (A.46, Ex. P-2, No. 3).

On May 1, 1974, at the request of the property owner, attorney Harry Strauss wrote Mayor Russell Davis, Commissioner Kelly and Commissioner Shanks relative to the dilemma that property owner found itself in and requested some action regarding the issuance of the permit (A.54, Ex. P-3, No. 1). This letter was referred to the City Attorney, John Stone, for consideration, and on May 8, 1974, he advised Strauss by letter that the situation had not changed regarding the issuance of the permit, but that he would keep them advised (A.53, Ex. P-3, No. 1). Upon receipt of Stone's letter of May 8, property owner requested that Strauss institute legal proceedings.

By August of 1974, property owner had made interest payments of $28,068.56 (A.143). The principal balance on the purchase price note was due on October 18, 1974, and the property owner, because of the stalemate situation on building, was unable to obtain either construction financing or permanent financing and was forced to allow the property to go into foreclosure. The property did go into foreclosure and was bought in by the individuals, corporations and partnerships that sold this property to property owner (A.148).

Property owner filed its Complaint in the District Court, alleging jurisdiction of that Court under the Fifth and Fourteenth Amendments of the Constitution of the United States and Title 28, Section 1331 of the United States Code, seeking damages of $111,000.00, interest and costs (A.1). The District Court awarded property owner a judgment against the City for $88,-068.50, together with interest and costs, and denied any relief against the State Highway Department, State of Mississippi (A. 202).

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the judgment entered by the District Court on the grounds that Petitioner's claim was wholly insubstantial and frivolous. Petitioner now applies to this Honorable Court as

it verily believes that the Court of Appeals misapplied the standards set forth by this Court and by the Court of Appeals itself as that Court admitted in its opinion that "[t]his case presents a novel question of constitutional law . . .," 565 F.2d at 342, and only by construing the constitutional provision involved could the Court determine the validity of the Petitioner's claim. 565 F.2d at 341. The Court of Appeals, in effect, wrongfully substituted its own finding of fact for that of the trier of fact—the District Court.

REASONS FOR GRANTING THE WRIT

We believe that this case furnishes the Court two distinct and important issues which have imposed insurmountable confusion in the lower courts, both federal and state, warranting a much-needed ruling by this Honorable Court; (1) whether a municipality's denial of a building permit, ultimately resulting in the property owner's loss of his property for inability to obtain financing, is a compensable taking under the Fifth and Fourteenth Amendments to the Constitution of the United States; and (2) whether the Federal District Court has jurisdiction, under 28 U.S.C., Section 1331, to entertain suits based thereon.

The United States Court of Appeals for the Fifth Circuit in its opinion in the case at bar, held that the first question here presented was a novel question of constitutional law. There are cases where such a denial was held to constitute a compensable taking. Citing *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359-60, 89 L.Ed. 311 (1945), rendered by this Honorable Court, the Court of Appeals here held "while the City of Jackson did not condemn or physically occupy Southpark's land, '[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.' " 565 F.2d at 342.

With a possibility of such a denial constituting a compensable taking, the Court of Appeals found it difficult to determine whether such was the situation in the case at bar. One point is certain, however, and that is that it was not so obvious that there was not such a taking. The Court of Appeals, itself, after stating that the case presented a novel question of constitutional law, found "no prior cases which make it 'apparent to a legal certainty that no constitutional violation had been committed as alleged.' " 565 F.2d at 342.

In footnote 6 of its opinion, the Court of Appeals in the instant case listed several cases, as hereinafter more fully appears, reaching "disparate conclusions hinging on subtle distinctions and not clearly foreclosing a finding for the Plaintiff in this case." 565 F.2d at 342.

With this backdrop of "disparate" cases on such a "novel question of constitutional law," we verily believe that the Federal District Court correctly asserted its jurisdiction here to make such a determination on the merits.

To take advantage of this clear opportunity to establish the necessary guidelines for lower trial courts on these unique constitutional and jurisdictional questions, and for all of the foregoing reasons, we humbly ask this Court to grant its Writ of Certiorari to Petitioner, Southpark Square, Ltd.

ARGUMENT

This is an action by property owner, Southpark Square, Ltd., hereinafter referred to as "Petitioner" against the City of Jackson, Mississippi, which was brought as a claim arising under the Fifth and Fourteenth Amendments to the Constitution of the United States. This type of action is known as an inverse condemnation case which reflects the affirmative taking of an owner's property when one is deprived of its beneficial use by public authority. We specifically call to this Court's attention that much of the testimony which was considered by the lower District Court was contained in the depositions introduced into evidence by agreement of all parties which are reproduced within the record and which were considered by the Lower Court along with the oral testimony taken during trial. By definition inverse condemnation is:

> ". . . an action or eminent domain proceeding initiated by the property owner rather than the condemnor . . ."

And is available where:

> ". . . private property has been actually taken for public use without formal condemnation proceedings and where it appears there is no intention or willingness of the taker to bring such proceedings" 27 Am.Jur.2d, *Eminent Domain*, Section 478, p. 411.

The general rule applicable to these type proceedings is enunciated in 30 C.J.S., *Eminent Domain*, Section 399, pp. 475-77, as follows, to wit:

> "Except where there is an exclusive statutory remedy, the owner of property appropriated for a public purpose without compensation having been made may demand and recover the value of the property taken. Such an action is sometimes treated as a condemnation proceeding and is designated as a proceeding in reverse or inverse condemnation. The fact that the action is brought by the owner rather than the condemnor does not change its essential nature. *The action is not based on tort, but on the constitutional prohibition of the taking of property without compensation.*" [Emphasis added].

The "inverse condemnation" proceeding differs only in that the land owner institutes the action rather than the entity possessing condemnation powers. The legal doctrine of inverse condemnation has been recognized by the state courts in many instances. See *Jackson Municipal Airport Authority v. Evans*, 191 So2d 126 (Miss. 1966); *Jacksonville v. Schumann*, 167 So2d 95 (Fla.App. 1964); *Martin v. Port of Seattle*, 64 Wash.2d 309, 391 P.2d 540, cert. den. 379 U.S. 989, 85 S.Ct. 701, 131 L.Ed.2d 610.

It is also well settled that the doctrine of inverse condemnation is recognized and applied in the Federal courts. Citing the case of *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359-60, 89 L.Ed. 311 (1945), a decision rendered by this Honorable Court, the United States

Court of Appeals for the Fifth Circuit, itself, in the case at bar, recognized that ". . . while the City of Jackson did not condemn or physically occupy Southpark's land, '[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter to amount to a taking.'" 565 F.2d at 342.

In *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964), the Court held:

> "The Plaintiff claims a right under the Fourteenth Amendment to the United States Constitution not to be deprived of his property without due process of law and that the acts of the Defendant constituted such a deprivation. If the Fourteenth Amendment is so construed, his claim is defeated. The District Court has jurisdiction under Section 1331, Title 28, United States Code, to decide this question. Cuyahoga River Power Company v. City of Akron, 240 U.S. 462, 36 S.Ct. 402, 6 L.Ed. 743; Mosher v. City of Phoenix, 287 U.S. 29, 53 S.Ct. 67, 77 L.Ed. 148"

The Court went on to reverse the Lower Court's decision on the issue of jurisdiction, directing the District Court to take jurisdiction, hear and decide the case on the merits.

In *Ballard Fish & Oyster Company, Inc. v. Glaser Construction Company, Inc.*, 424 F.2d 473 (4th Cir. 1970), that Court of Appeals held that a natural gas company's occupancy of privately owned oyster beds without first acquiring an easement, either by grant or condemnation, was action taken under color of state law, and the question of whether the gas company's occupancy constituted an unlawful taking of property without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States raised Federal questions and Federal jurisdiction over the owner's action against the gas company. The Court there stated:

> "It is now well settled that the due process clause of the Fourteenth Amendment denies a state, or any of its instrumentalities, the power to take private property for a public use without just compensation. Mosher v. City of Phoenix, 287 U.S. 29, 53 S.Ct. 67, 77 L.Ed. 148 (1932); Chicago, B & Q R. R. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)." 424 F.2d at 474.

The City contended in the case at bar that it may, through the exercise of police power, fetter and inhibit the valid use of the property in question. The rule putting this premise to rest is further set forth in 29 C.J.S., *Eminent Domain*, Section 6, p. 182, as follows, to wit:

> ". . . police regulations must be reasonable, and the legislature cannot, under the guise of the police power, imposed unreasonable or arbitrary regulations which go beyond that power, and in effect deprive a person of his property within the purview of the law of eminent domain, as by depriving the owner of all profitable use of the property not per se injurious or pernicious restricting the lawful uses to which the property can be put and destroying its value, permanently so restricting the use of the property that it cannot be used for any reasonable purpose, or completely destroying the beneficial interest of the owner."

Section 1331, Title 28, United States Code, provides:

> "(a) The District Court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

The Court of Appeals in its opinion of reversal in the case at bar clearly failed to correctly apply the two-prong test of *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 539 (1945),

to the factual situation of the case at bar in holding that Petitioner's claim was *wholly* insubstantial and frivolous, for as the Court of Appeals, itself, correctly observed, "if there is *any* foundation of plausibility to the claim federal jurisdiction exists." 565 F.2d at 342-43. [Emphasis Added].

The Fifth Circuit stated explicitly "[t]his case presents a novel question of constitutional law; whether a City's denial of a building permit, ultimately resulting in the owner's loss of his property for inability to obtain financing, is a compensible taking." 565 F.2d at 342; and in recognition of Petitioner's allegation that the City's actions were in violation of the Fifth and Fourteenth Amendments to not have its property taken without just compensation, held that "[o]nly by construing that constitutional provision can we determine the validity of this claim. Thus, a question 'arising under' the Constitution is presented in this case." 565 F.2d at 341.

> Thus, as in the landmark case of *Bell v. Hood*, supra, "The Complaint did, in fact, raise serious questions, both of law and fact, which the District Court [could] decide only after it [had] assumed jurisdiction over the controversy." 327 U.S. at 683.

The Court of Appeals, here, thus erred in failing to apply the proper rule of *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); and *Swafford v. Templeton*, 185 U.S. 487 (1901); that "[t]he claim may fail in a later stage for a variety of reasons; but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation, as was the case in *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936)." However, even if *Gully*, supra, should be deemed applicable to the instant case, then the Petitioner's claim satisfies the four-point test set out in that case:

> (1) A right created by the Constitution or laws of the United States is an essential element of Petitioner's cause of action;
>
> (2) That right is such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if given another;
>
> (3) A genuine and present controversy, not merely a possible or conjectural one, exists with reference thereto;
>
> (4) The controversy is disclosed upon the face of the complaint, unaided by the answer or other pleading.

Regarding the second element of this four-point test, the Court of Appeals, in the instant case, has obviously failed to apply its own rule set forth in the case of *Hines v. Cenla Community Action Committee, Inc.*, 474 F.2d 1052, 1056 (5th Cir. 1973), that in construing a federal law or Constitutional provision to see whether one construction will promote the complaint and another defeat it, the construction "does not mean that 'the case will necessarily turn upon an interpretation of the statute, but simply that the complaint must set forth a cause of action of which federal law is an essential ingredient, and which may, therefore, properly involve a construction of that law." Furthermore, the Court of Appeals clearly failed to apply its rule set forth in *International Association of Machinists v. Central Airlines, Inc.*, 295 F.2d 209, 218 (5th Cir. 1961), that "it is the suit, not a question in the suit, that must arise under the laws of the United States" in order for federal jurisdiction to exist and that rule of *McGoon v. Northern Pacific Railway Company*, 204 F. 998 (D.C.N.D. 1913), that a federal law creating a federal right gives rise to the right to sue under that federal law to enforce that right. "When the complaint asserts a right created by federal law, it presents a suit which may properly turn upon a construction of that law; and such a suit 'arises out of' the law for purposes of federal jurisdiction." 204

F. at 1005. The purpose of these rules would clearly be defeated if a Plaintiff such as Petitioner, were deprived of a federal forum in which to protect his federal rights.

The District Court in the instant case found specifically that it had jurisdiction of Petitioner's claim and the power and authority to settle it (A.200). Citing *Foster v. City of Detroit,* 264 F.Supp. 655, affirmed 405 F.2d 138 (6th Cir. 1968), motion denied 423 F.2d 660; Section 1331, Title 28, U.S.C.; *Cuyahoga River Power Company v. City of Akron,* 240 U.S. 462, 36 S.Ct. 402, 60 L.Ed 743 (1815); *Mosher v. City of Phoenix,* 287 U.S. 29, 53 S.Ct. 67, 77 L.Ed. 148 (1932).

Respondent, the City of Jackson, never contended either that the matter in controversy here involved was less than the jurisdictional amount or that the Petitioner's claim was not cognizable under the Constitution of the United States. Jurisdiction of the District Court was not attacked on either of these two theories; rather, the City urged lack of jurisdiction for the following reasons:

(1) The City Council did not pass on the issuance of Petitioner's building permit;

(2) Petitioner did not avail itself of its legal remedies, i.e., appeal, mandamus and exhaustion of administrative remedies.

No federal authority was cited which would negate federal question jurisdiction or which required the Petitioner to pursue its federal claim in state courts and local administrative boards. Respondent cited numerous cases under the laws of Mississippi and Texas, and while these cases may be determinative of claims and rights under the laws of the State of Mississippi and the State of Texas, these holdings are not controlling and dispositive of Petitioner's federal claim and the jurisdiction of the Federal Courts.

In response to the City's contention that Petitioner had adequate administrative and judicial remedies under state and local law, Petitioner recognizes the subtle doctrine which requires resort to administrative remedies prior to resorting to court actions for redress where the administrative remedy is: (1) adequate; (2) involved with specialized administrative understanding and expertise; (3) there will be no additional injury as a result of pursuing the administrative remedy. 3 Davis, *Administrative Law Treatise* (1958) Sec. 20.10 sets out the test for exhaustion of remedies thusly:

> "Probably the guide to requiring or not requiring exhaustion when administrative jurisdiction is challenged should be examination of three main variables—extent of injury from pursuit of administrative remedies, degree of apparent clarity of doubt about administrative jurisdiction and involvement of specialized administrative understanding in the question of jurisdiction."

This Honorable Court, itself, clearly recognized the above principles applicable to the doctrine of exhaustion in *NLRB v. Shipbuilding Local 22,* 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed. 2d 706 (1968). There, this Court stated as settled law that:

> "Exhaustion is not required when the administrative remedies are inadequate."

In the District Court opinion by the Honorable Judge, William Harold Cox, it is stated:

> "The administrative remedies allegedly available to the plaintiff under the circumstances were completely inadequate. Such remedies are not expeditious and efficient as is the right of this plaintiff to resort to this Court for redress of its injuries. That defense is addressed to the sound judicial discretion of the Court."

There referring to the case of *NLRB v. Shipbuilding Local 22,* supra (Appendix, p. 200 n. 2).

The learned District Judge further stated:

> "The municipality contends that this Court is without jurisdiction of this claim under such circumstances. This Court is of the opinion that it does have jurisdiction of this claim and has the power and authority to settle it."

There referring to *Foster v. Herley*, supra (Appendix, Pg. 200 n. 1).

The facts contained in the record of the Lower Court, including the depositions, clearly show the action taken by the City was arbitrary. The denial of the building permit, pending a decision by the Mississippi Highway Department on construction of the Beasley Road interchange, did affect the beneficial ownership of the property owned by Petitioner. The Court of Appeals' decision that the effect was "speculative at best" is completely in disregard of the record. The record clearly shows that as a direct result the property was foreclosed upon by the mortgage holders.

The District Judge was the trier of fact and law. Acting as the juror he had determined that the taking on the part of the City was unreasonable. Once that determination was made, the Court of Appeals should be held to be unable to substitute itself as the trier of the factual situation which is within the District Court's province.

The above clearly exhibits that the Court of Appeals consistently took the record and acted not as an appellate court but as a trier of fact, and they decided what the City did was not arbitrary and capricious. This is clearly within the province of the jury and without a jury it is completely within the discretion of the Lower Court.

Lastly, and most importantly, we once again single out for the Court the remarks of the Court of Appeals contained on page 342 of its opinion:

> "This case presents a novel question of constitutional law; whether a city's denial of a building permit, ultimately resulting in the owner's loss of his property for inability to obtain financing, is a compensable taking."

The above statement, in and of itself, clearly reflects that the Court of Appeals substituted its judgment of the facts for and in behalf of the distinguished Lower Court Judge William Harold Cox for there is one word that is glaringly absent. The issue is, in the writer's opinion:

> "Whether a City's *arbitrary* denial of a building permit ultimately resulting in the owner's loss of his property for inability to obtain financing is a compensable taking."

and

> "Whether or not federal jurisdiction is invited upon this issue."

A reading of the record and facts as shown by the evidence and the depositions reveals that even on the date of this Petition for Writ of Certiorari, April, 1978, there is no interchange nor is one foreseen in the near future on the property in question in Jackson, Mississippi.

CONCLUSION

Petitioner respectfully submits that a review of the record and the appendices attached hereto would indicate that this Petition for Writ of Certiorari should be granted, and the decision of the Fifth Circuit Court of Appeals which reversed the judgment of the Lower Court should be set aside and the judgment reinstated.

Respectfully submitted,

ALVIN M. BINDER
511 East Pearl Street
Post Office Box 25
Jackson, Mississippi 39205
(601) 948-8800
Attorney for Petitioner

PROOF OF SERVICE

The undersigned counsel for Plaintiff-Petitioner certifies that three (3) true and correct copies of the foregoing Petition for a Writ of Certiorari has this day been mailed by United States Mail, postage prepaid, to the Honorable John E. Stone, City Attorney, Counsel for Defendant-Respondent, City of Jackson, Mississippi, at his office at 220 South President Street, Jackson, Mississippi 39201; and to the Honorable Robert G. Nichols, Counsel for Defendant-Respondent, Mississippi State Highway Department, at his office at Post Office Box 1526, Jackson, Mississippi 39205.

This the .... day of May, 1978.

ALVIN M. BINDER
Attorney for Plaintiff-Petitioner

APPENDIX

APPENDIX "A"

SOUTHPARK SQUARE LIMITED,
a Mississippi Corporation,
Plaintiff-Appellee,

v.

CITY OF JACKSON, MISSISSIPPI,
Defendant-Appellant,
State Highway Department of the State
of Mississippi, Defendant.

No. 76-1806.

United States Court of Appeals,
Fifth Circuit.

Dec. 27, 1977.

(565 F.2d 338)

Action was brought against municipality and the state to recover for alleged taking of plaintiff's property without just compensation. The United States District Court for the Southern District of Mississippi, William Harold Cox, J., granted judgment for plaintiff against the municipality, and the latter appealed. The Court of Appeals, Simpson, Circuit Judge, held that: (1) although a claim is not foreclosed by prior authoritative decisions, it must be more than frivolous to support federal question jurisdiction, and (2) claim that a compensable taking occurred when city denied building permit, with result that financing could not be obtained, thereby causing plaintiff to lose the property through foreclosure, was wholly insubstantial and frivolous where, among other things, permit was denied because of

uncertainty as to how much of the property would be taken by proposed highway interchange, only ten-month delay was involved, owner did not appeal permit denial and property increased in value during the year in which it held title.

Reversed with directions.

1. Federal Courts Key 241

Failure of a complaint to cite statute conferring jurisdiction on district court will not defeat jurisdiction where the facts alleged satisfy statutory jurisdictional requirements. 28 U.S.C.A. § 1331.

2. Federal Courts Key 241

In federal question cases, where the complaint is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions, must entertain the suit; the exceptions are where the federal question clearly appears to be immaterial and made solely for purpose of obtaining jurisdiction or where the claim is wholly insubstantial and frivolous. 28 U.S.C.A. §§ 1331, 1331 (a), 1653.

3. Federal Courts Key 242

A federal question is wholly insubstantial and frivolous where it is either obviously without merit or its unsoundness so clearly results from previous decisions of the United States Supreme Court as to foreclose the subject. 28 U.S.C.A. §§ 1331, 1331(a), 1653.

4. Federal Courts Key 242

Even though a federal claim is not foreclosed by prior authoritative decisions, it must be more than frivolous to support federal question jurisdiction. 28 U.S.C.A. §§ 1331, 1331(a), 1653.

5. Federal Courts Key 242

Issue of federal question jurisdiction is entirely separate from question whether the complaint states a claim on which relief can be granted; although a federal question substantial enough to confer jurisdiction but not substantial enough to state a cause of action is difficult to conceive, the doctrine is well established, for failure to state a proper cause of action calls for judgment on the merits and not for dismissal for want of jurisdiction. 28 U.S.C.A. §§ 1331, 1331(a), 1653.

6. Federal Courts Key 243

Claim that city's refusal to issue building permit for motel constituted a taking without compensation, in that for want of such permit financing could not be obtained thereby causing owner to lose the property through foreclosure, was wholly insubstantial and frivolous where permit was denied because of uncertainty as to how much of the property would be taken by the proposed highway interchange, only ten-month delay was involved, owner did not appeal permit denial or seek mandamus and property increased in value during year in which it held title; claim was so wholly insubstantial and frivolous that district court lacked federal question jurisdiction. U.S.C.A. Const. Amends. 5, 14; 28 U.S.C.A. § 1331.

7. Eminent Domain Key 2(1)

In deciding to build a motel on the property, the plaintiff complaining that denial of building permit amounted to a taking of property without just compensation, took risk that its application would be denied in a proper exercise of the municipality's police power. U.S.C.A.Const. Amends. 5, 14.

4. Federal Courts Key 242

Even though a federal claim is not foreclosed by prior authoritative decisions, it must be more than frivolous to support federal question jurisdiction. 28 U.S.C.A. §§ 1331, 1331(a), 1653.

5. Federal Courts Key 242

Issue of federal question jurisdiction is entirely separate from question whether the complaint states a claim on which relief can be granted; although a federal question substantial enough to confer jurisdiction but not substantial enough to state a cause of action is difficult to conceive, the doctrine is well established, for failure to state a proper cause of action calls for judgment on the merits and not for dismissal for want of jurisdiction. 28 U.S.C.A. §§ 1331, 1331(a), 1653.

6. Federal Courts Key 243

Claim that city's refusal to issue building permit for motel constituted a taking without compensation, in that for want of such permit financing could not be obtained thereby causing owner to lose the property through foreclosure, was wholly insubstantial and frivolous where permit was denied because of

uncertainty as to how much of the property would be taken by the proposed highway interchange, only ten-month delay was involved, owner did not appeal permit denial or seek mandamus and property increased in value during year in which it held title; claim was so wholly insubstantial and frivolous that district court lacked federal question jurisdiction. U.S.C.A. Const. Amends. 5, 14; 28 U.S.C.A. § 1331.

7. Eminent Domain Key 2(1)

In deciding to build a motel on the property, the plaintiff complaining that denial of building permit amounted to a taking of property without just compensation, took risk that its application would be denied in a proper exercise of the municipality's police power. U.S.C.A.Const. Amends. 5, 14.

8. Eminent Domain Key 2(1)

Federal courts are extremely reluctant to find that denials of building permits in exercise of municipality's police power are so arbitrary and capricious as to transform them from permissible regulation to compensable taking. U.S.C.A.Const. Amends. 5, 14.

9. Mandamus Key 87

Mandamus is available under Mississippi law to compel issuance of an improperly denied building permit.

John E. Stone, City Atty., Jackson, Miss., for defendant-appellant.

Alvin M. Binder, Jackson, Miss., for plaintiff-appellee.

Robert G. Nichols Jr., Jackson, Miss., for other interested parties.

Appeal from the United States District Court for the Southern District of Mississippi.

Before COLEMAN, SIMPSON and TJOFLAT, Circuit Judges.

SIMPSON, Circuit Judge:

For want of a building permit, financing could not be obtained. For want of financing, the balance of the purchase price of the property could not be paid. For want of payment, the property went into foreclosure and was sold at auction. So says Southpark Square Limited, the aggrieved property owner. In the court below, Southpark prevailed on its claim that, because of these unfortunate consequences, the denial of a building permit by the Permit Department of the City of Jackson, Mississippi, amounted to a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments,[1] and received a judgment for damages. We determine that the district court lacked subject matter jurisdiction and reverse.

---

[1] The district court explained its finding of a constitutional taking as follows:

> The municipality did not wish to authorize the plaintiff to construct its vast improvements necessary for the construction of this Ramada Inn at this site under such circumstances, but the municipality clearly violated the property rights of the plaintiff in deferring and thus refusing to grant such permit under such circumstances. There were certain adjustments to be made on the site before the Ramada Inn could be permitted to move in and occupy such facility but it is no answer to this claim to say that such facilities are not then available to the lot. This action of the municipality resulted in a taking or damaging plaintiff's property without making any sort of compensation therefor. Such taking or damaging was for public use.

I. THE FACTS

On December 3, 1973, after earlier negotiations, Southpark acquired title to a plot of land fronting on Interstate 55 in Jackson, Mississippi. The aggregate purchase price was $434,000, in addition to $10,000 earlier paid for an option on the property. On this date, Southpark made a down payment of $50,000 and executed a note for the balance, payable on October 18, 1974, at an interest rate of 10 percent per annum. Southpark's purpose in acquiring the property was to build on it a Ramada Inn.

On February 4, 1974, Southpark applied to the City of Jackson Permit Department for a building permit to construct a foundation for the hotel. The application immediately encountered minor obstacles because of a local zoning ordinance and the unavailability of water and sewerage lines. A more serious problem arose when the city permit department learned from the State Highway Department that an interchange at Beasley Road on I-55 was in the planning and would require a right of way over a portion of the road frontage of Southpark's property. On February 15, 1974, Murry Stewart, the City Engineer, informed Southpark of the proposed Beasley Road interchange, noting that "[t]he exact amount of right of way needed has not been determined as yet". Six days later, Stewart again wrote to Southpark about the eventual need to acquire some of the frontage property and stated that issuance of the building permit was being deferred until city officials knew more precisely the extent of right of way needed. The City admits that it declined to issue a permit out of concern that the award of compensation when it eventually condemned the land would be substantially higher if the hotel was then in being. Stewart did suggest to Southpark, in a letter dated March 18, 1974, that "the developer alter his construction plans so as to, if possible, have his development confined to property that will remain after this right-of-way acquisition." Faced with this denial, counsel for Southpark, on

May 1, 1974, wrote to the Mayor and City Commissioners of Jackson to inform them of Southpark's precarious financial position, threatening to bring suit if the permit did not issue. The City, through its attorney, responded that until the State Highway Department finalized its plans "we cannot give you at this time any further information other than that previously furnished you".

Southpark was unable to pay the balance of the purchase price when it fell due late in 1974, and contends that it could not obtain financing because of its inability to secure a building permit. It thus forfeited the property to the vendor. On December 18, 1974, Southpark filed its complaint against the City of Jackson and the State of Mississippi Highway Department in this case, claiming damages of (a) $10,000, for loss of earnest money paid for the property; (b) $50,000, for loss of down payment on the property; (c) $48,000, for loss of sums advanced for architectural and development fees; (d) $3100 for loss of attorneys' fees expended; and (e) 10% interest on the unpaid balance of the purchase price of the property. The court dismissed the claims against the State Highway Department and awarded damages against the City for items (a), (b) and (e), totalling $88,068.50. This appeal timely followed.

II. JURISDICTION OF THE DISTRICT COURT

[1] At the heart of this appeal lies the question of jurisdiction —whether the district court was statutorily empowered to hear this case. In its complaint, Southpark alleged that "this action arises under the Fifth and Fourteenth Amendments to the Constitution . . . and the matter in controversy herein exceeds, exclusive of interest and costs, the sum of $10,000.00".[2] The district court concluded that it had subject matter jurisdiction under Title 28, U.S.C. § 1331 (1970).[3]

[2] Although the complaint failed to cite the statute conferring jurisdiction on the district court, 28 U.S.C. § 1331 (1970), this omission will not defeat jurisdiction where the facts alleged in the complaint satisfy the jurisdictional requirements of the statute. See *Schlesinger v. Councilman*, 420 U.S. 738, 744, n. 9, 95 S.Ct. 1300, 1306 n. 9, 43 L.Ed.2d 591 (1975); *Smith v. United States*, 502 F.2d 512, 519-20 (5th Cir. 1974). Title 28 U.S.C. § 1653 provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts". In light of our disposition of this case, it would be "a baseless formality" to require Southpark to amend its complaint at this point. *Eisler v. Stritzer*, 535 F.2d 148, 152-53 n. 3 (1st Cir. 1976).

[2] "Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other". *Hagans v. Lavine*, 415 U.S. 528, 538, 94 S.Ct. 1372, 1379-80, 39 L.Ed.2d 577 (1974). In federal question cases under § 1331, "where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions . . . must entertain the suit". *Bell v. Hood*, 327 U.S. 678, 681-82, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). The two exceptions are where the federal question "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous". Id.

"A case arises under the Constitution or law of the United States whenever . . . the title or rights set up by the party may be defeated or sustained by a particular construction of [either]."

[3] Section 1331(a) provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States *except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.*

The italicized language, of on concern here, was added by amendment October 21, 1976. See Pub.L. 94-574, § 2, 90 Stat. 2721. This language did not appear in the statute on the date of suit, December 18, 1974.

Fountain v. New Orleans Public Service, Inc., 387 F.2d 343, 344 (5th Cir. 1967), citing *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936). Southpark alleges that the City's actions have violated its Fifth Amendment right not to have its property taken without just compensation. Only by construing that constitutional provision can we determine the validity of this claim. Thus, a question "arising under" the Constitution is presented in this case. *Ballard Fish & Oyster Co. v. Glaser Construc. Co.*, 424 F.2d 473 (4th Cir. 1970); *Creel v. City of Atlanta, Ga.*, 399 F.2d 777, 778 (5th Cir. 1968); *Foster v. Herley*, 330 F.2d 87, 91 (6th Cir. 1964);[4] *Sanfilippo v. County of Santa Cruz*, 415 F.Supp. 1340, 1343-44 (N.D.Cal. 1976).

[3] The more difficult question presented is whether the federal question involved is "wholly insubstantial and frivolous."[5] To make this determination we must apply a two-pronged test:

> [L]ack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject.

Mays v. Kirk, 414 F.2d 131, 135 (5th Cir. 1969), quoting from *California Water Service Co. v. City of Redding*, 304 U.S. 252, 58 S.Ct. 865, 867, 82 L.Ed. 1323 (1938).

[4] The *Foster* case, relied on by the district court in this case, was a class action on behalf of property owners who alleged that their property was taken by the City of Detroit when it stalled an eminent domain action for ten years, resulting in serious depreciation of property values. The case was first dismissed for lack of subject matter jurisdiction, 207 F.Supp. 71 (E.D.Mich.1962). The Court of Appeals reversed, holding that federal question jurisdiction was established. 330 F.2d 87 (6th Cir. 1964). On remand, the district court found that the City's actions amounted to a compensable taking and awarded damages. 254 F.Supp. 655 (E.D.Mich.1966), aff'd, 405 F.2d 138 (6th Cir. 1968). We cited the jurisdictional principles of the case with approval in *Traylor v. City of Amarillo, Texas*, 492 F.2d 1156, 1157 n. 2 (5th Cir. 1974). For a narrow reading of *Foster*, see *Jimmie's Inc. v. City of West Haven*, 436 F.2d 1339 (2d Cir. 1971).

[5] The other exception to the rule of *Bell v. Hood, supra*,—that the federal question be "immaterial"—is not involved in this case. The constitutional claims, whatever their merit or substance, are the essence of this lawsuit. See *Creel v. City of Atlanta, Ga.*, 399 F.2d 777, 778 (5th Cir. 1968).

This case presents a novel question of constitutional law: whether a city's denial of a building permit, ultimately resulting in the owner's loss of his property for inability to obtain financing, is a compensable taking. We can find no prior cases which make it "apparent to a legal certainty that no constitutional violation had been committed as alleged." *Rodriguez v. Ritchey*, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc). Courts dealing with the taking question in roughly analogous fact situations have reached disparate conclusions hinging on subtle distinctions and not clearly foreclosing a finding for the plaintiff in this case.[6] A dispositive prior decision would be difficult to find because traditionally, the Supreme Court has "treated the issue as to

[6] In *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), this Court held that denial of a building permit pursuant to an ordinance enacted to preserve a historic section of the city did not amount to a taking. Under similar circumstances, the Court of Claims found a taking, distinguishing Maher because the the plaintiff in that case "had not shown that sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed". *Benenson v. United States*, 548 F.2d 939, 949 (Ct.Cl.1977) (quoting from 516 F.2d at 1066). In *Kirschke v. City of Houston*, 330 S.W.2d 629 (Tex.Civ.App.1960), appeal dismissed, 364 U.S. 474, 81 S.Ct. 242, 5 L.Ed.2d 221 (1960), a Texas court held that denial of a building permit because of anticipated highway construction was not a constitutional taking where the property owner could still compel issuance of the permit by mandamus. Sixteen years later another Texas court refused to follow *Kirschke* in a case which closely parallels the instant case. The issue before the court in *San Antonio River Authority v. Garrett Brothers*, 528 S.W.2d 266 (Tex.Civ.App.1975), was "whether prohibitions on use of property which have as their purpose the prevention of private development that would increase the cost of planned future acquisition of such prop-

whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case". *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958). Also, while the City of Jackson did not condemn or physically occupy Southpark's land, "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking". *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359-60, 89 L.Ed. 311 (1945).

[4, 5] Even though Southpark's claim is not foreclosed by prior authoritative decisions, it must be more than frivolous to support federal question jurisdiction. In determining substantiality, we must ask "whether there is any legal substance to the position the plaintiff is presenting". C. Wright & A. Miller, 13 Federal Practice and Procedure § 3564, at 426 (1975). The test here "is a rigorous one and if there is any foundation of plausibility to the claim federal jurisdiction exists". *Id.* at 428, quoted

---

erty by the government is the type of case in which payment of compensation is required." Id. at 273. The court held that the just compensation clause of the Fifth Amendment prohibited the government "as a prospective purchaser of land, to give itself such an advantage" by denying a building permit. Id. at 274. Similarly, while the California Supreme Court has held that no "cause of action in inverse condemnation [is] stated for the denial of a building permit," *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111, 122 (1973), it has suggested that oppressive conduct or unreasonable delay in connection with the denial could alter this result. *Klopping v. City of Whittier*, 8 Cal.3rd 39, 104 Cal.Rptr. 1, 500 P.2d 1345, 1350 n. 1 (1972). *See also Antonelli Construction v. Milstead*, 34 N.J.Super. 449, 112 A.2d 608 (1955): "To prevent the plaintiff from improving its land in order that the municipality may continue to have a drainage area by the means here employed [denial of a building permit] is clearly a taking without due process or compensation, and hence unconstitutional". Id. at 614.

in *Hilgeman v. National Ins. Co. of America*, 547 F.2d 298, 300 n. 1 (5th Cir. 1977).[7]

[6-9] However hard we strain to find "any legal substance" to Southpark's position, we cannot avoid the conclusion that its claim is "wholly insubstantial and frivolous". Southpark lost its property as a direct consequence of its own financial arrangements and tactical decisions, not because the City committed any act remotely resembling a taking.

The City of Jackson denied Southpark's application for a building permit pending a decision by the State Highway Department regarding construction of the Beasley Road interchange. The effect of this denial on Southpark's beneficial ownership of the property is speculative at best. We do not know whether the City's determination would have been reversed had Southpark filed a formal administrative appeal, an appeal to a state court, or a petition for a writ of mandamus to compel issuance of the permit. Even assuming that denial of the permit was valid and would have withstood any legal challenge by Southpark, the value of the property actually increased during the year in which Southpark held title. Had Southpark looked for and found a purchaser willing to assume the mortgage, or to pay

---

[7] In finding a lack of subject matter jurisdiction under this test, we are well aware that "[t]he jurisdictional issue here is entirely separate from the questions whether the complaint states a claim on which relief can be granted . . . ." *Weir v. Muller*, 527 F.2d 872, 873 (5th Cir. 1976). As the Supreme Court noted in *Bell v. Hood, supra*, "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction". 327 U.S. at 682, 66 S.Ct. at 776. Although a federal question substantial enough to confer jurisdiction but not substantial enough to state a cause of action is difficult to conceive, the doctrine is well established. See, e. g., *Wheeldin v. Wheeler*, 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963). Courts must thus draw fine lines, even if to some the distinction between a dismissal for lack of jurisdiction and dismissal for failure to state a claim upon which relief can be granted is "an exercise in semantics". Barron & Holtzoff, 1 Federal Practice and Procedure § 25, at 124 (1960).

cash in full, it might have sold the property, either at no loss or even at a profit. In essence, then, Southpark is seeking to hold the City liable in damages, through inverse condemnation, for the financial arrangements of a private mortgagor.

Considered against the facts of this case, such a proposition is unsupportable in law or policy. Southpark defaulted on its note for the purchase price of the property only ten months after the county engineer denied the building permit pending a decision with respect to the condemnation of a portion of the property in question. While it is conceivable that a municipality's denial of a permit for similar reasons may be so manifestly in bad faith or accompanied by unreasonable and oppressive delay as to constitute a taking,[8] this is not such a case. We would deny a municipality the breathing space needed for responsible decision-making in the vital realm of urban planning if we held that it could not wait ten months to determine what property is needed for major road construction. A city would be unduly hamstrung if its permit decisions subjected it to potential liability on the basis of financial arrangements independently made by property owners affected by those decisions.

The equities of this case also argue strongly against the position asserted by Southpark. In deciding to build a Ramada Inn on its property, Southpark took the risk that its application for a building permit would be denied in a proper exercise of the police power by the City of Jackson.[9] The Federal courts have

[8] See, e.g., *Foster v. City of Detroit, Mich.*, 254 F.Supp. 655, 661 (E.D.Mich.1966), aff'd, 405 F.2d 138 (6th Cir. 1968), where the city was charged with "causing and permitting the threat of imminent condemnation to hang over [the] property for ten years, all the while encouraging the decay and desertion of the area, and then discontinuing the action and instituting new proceedings with appraisals based on the lower values of vacant property in a, by this time, blighted area".

[9] "Those who enter upon a business take that risk". *Alaska Fish Salting and By-Products Co. v. Smith*, 255 U.S. 44, 48, 41 S.Ct. 219, 220, 65 L.Ed.2d 489 (1921).

been extremely reluctant to find such permit denials so arbitrary and capricious as to transform them from permissible regulation to compensable taking. See, e. g., *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *Trinity Methodist Church, South v. Federal Radio Comm'n*, 61 App.D.C. 311, 62 F.2d 850 (1932), cert. denied, 288 U.S. 599, 53 S.Ct. 317, 77 L.Ed. 975 (1933); *Pope v. City of Atlanta*, 418 F.Supp. 665 (N.D.Ga. 1976). If the City did illegally deny the permit in this case, Southpark could have acted to redress the wrong and possibly have avoided the forfeiture which was otherwise inevitable. A local ordinance allowed an appeal within five days to the City Council from a permit decision by the City Engineer.[10] Mississippi law provides for an appeal from a decision of the City Council to the Circuit Courts. Miss.Code Ann. § 11-51-75 (1972). See *Cowan v. Gulf City Fisheries, Inc.*, 344 So.2d 724 (Miss.1977); *City of Jackson v. Sunray DX Oil Co.*, 197 So.2d 882 (Miss. 1967). Additionally, mandamus is available to compel issuance of an improperly denied permit. *Thompson v. Mayfield*, 204 So.2d 878 (Miss.1967); *Berry v. Embrey*, 238 Miss. 819, 120 So.2d 165 (1960).[11] Of course, Southpark could have revised its building plans to avoid any possible conflict with the City's planned road construction. Yet all that Southpark did was to write a single letter to the mayor and city commissioners explaining its need for a permit in light of its inability to

[10] Section 10 of an ordinance passed by the Jackson City Council on June 1, 1950, recorded in Minute Book "Z", pages 198-203. The full ordinance is a part of the record in this case.

[11] Other states have considered the availability of mandamus as a bar to an inverse condemnation action. See *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111, 122 (1973); *Kirschke v. City of Houston*, 330 S.W.2d 629 (Tex.Civ.App.1960). We raise this consideration here as relevant to determining whether the actions of the City of Jackson can be construed as a taking, not to suggest that Southpark's failure to seek mandamus operates as a jurisdictional bar under the exhaustion doctrine. See *Foster v. City of Detroit*, Mich., 405 F.2d 138, 145 (6th Cir. 1968).

obtain financing, but not alleging that denial of the permit was illegal. For many months, Southpark stood mute, doing nothing to protect its property and legally abandoning its original application for a permit.[12]

Clearly, Southpark suffered damage: it lost its property. But "damage or loss does not of itself create a taking. Whether property has been taken for a public use so as to require just compensation is determined by the character of the invasion, not by the amount of damage suffered". *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955, 958 (6th Cir. 1970). The only municipal "invasion" involved in this case is the denial of a building permit—a denial which, on the record before us, cannot be branded as arbitrary, capricious, ultra vires, or as anything other than a valid exercise of the police power. We cannot consider such a denial as an invasion of any vested property right, for until a permit was issued, Southpark had no vested right to build a Ramada Inn. As relevant to the issue of whether there was a constitutional taking, the operative cause of Southpark's loss was the private financial arrangement made by it in acquiring the property. The city's exercise of its licensing power cannot be circumscribed, under an inverse condemnation theory, by private contracts to which it is not a party.

We hold that the district court was without power to entertain this federal question case otherwise within its jurisdiction because the claim asserted is "so attenuated and unsubstantial as to be absolutely devoid of merit". *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, 24 S.Ct. 553, 557, 48 L.Ed. 795

---

[12] A local ordinance regarding application for permits, adopted December 18, 1973, and made a part of the record in this case, provides as follows: "105.5—LIMITATION. An application for a permit for any proposed work shall be deemed to have been abandoned six months after the date of filing, unless before then a permit shall have been issued".

(1904). Lacking jurisdiction, the district court should have dismissed the action. Fed.R.Civ.P. 12(h)(3).

The judgment of the district court is accordingly reversed with directions to vacate the judgment appealed from and dismiss the action.

REVERSED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Dawson v. Hogan	77-2576	2/08/78	N.D.Ga., 567 F.2d 388
Garza v. Rodriguez	76-3898	2/21/78	S.D.Tex., 559 F.2d 259
Harrell v. Citizens Bank of Folkston-Nahunta-Hoboken, Georgia	76-1043	2/08/78	S.D.Ga., 567 F.2d 389
Laje v. R. E. Thomason General Hospital	76-1496	2/01/78	W.D.Tex., 564 F.2d 1159
Montgomery v. Jordan	77-1951	2/13/78	W.D.Tex., 567 F.2d 389
Padre Island, Steamtanker	75-3479	2/16/78	M.D.Fla., 559 F.2d 1008
Parnell v. Rapides Parish School Board	76-4176	2/03/78	W.D.La., 563 F.2d 180
Rapides Parish School Board v. Farrar	76-4176	2/03/78	W.D.La., 563 F.2d 180
Resendis v. Lee Way Motor Freight, Inc.	73-2322	2/03/78	W.D.Tex., 560 F.2d 1285
Socony Mobil Oil Co., Inc. v. Texas Coastal and International, Inc.	75-3479	2/16/78	M.D.Fla., 559 F.2d 1008
Southpark Square Limited v. City of Jackson, Mississippi	76-1806	2/02/78	S.D.Miss., 565 F.2d 338
U. S. v. Boswell	76-1843	2/15/78	S.D.Miss., 565 F.2d 1338